Supreme Court, U.S.
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No. 90-1761

In The

Supreme Court of the United States

October Term, 1990

JOHN MONROE, et al.,

Petitioners,

v.

CITY OF WOODVILLE, MISSISSIPPI, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

This case involves the denial of attorneys' fees on a Voting Rights case in which a Three-Judge Court denied all relief and the United States Supreme Court subsequently dismissed the Appeal as moot. In no manner were the positions of the parties changed as a result of the Petitioners' litigation.

The sole issue consists of the following:

> Whether the District Court's denial of attorneys' fees, upon its consideration of well-settled law and upon its finding that the Petitioners were not prevailing parties, was properly affirmed by the Fifth Circuit Court of Appeals since there was no abuse of discretion, no conflict with precedent from other circuits, and no departure from the accepted and usual course of judicial proceedings or conflict with applicable decisions of this Court.

PARTIES TO THE PROCEEDINGS BELOW

John Monroe, Jimmy Harris and John Green, individually and on behalf of a class certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure, defined as "all black citizens and all black registered voters of the City of Woodville, Mississippi."

City of Woodville, Mississippi, Ron Senko, in his capacity as Mayor of Woodville, Mississippi, George J. Gonda, former Mayor of Woodville, Mississippi, Andy J. Lewis, former Alderman, Frances Townsend as City Clerk, Gary D'Quilla, Charles James, Tim Sessions, Elnora Veals, current Aldermen; and Joe Townsend, Mary Magee, and Herbert Curry as Election Commissioners.

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit disposed of the appeal herein on summary calendar by per curium affirmance, entered by Goldberg, Garwood and Jones, Circuit Judges, on March 15, 1991. The opinion is unpublished, pursuant to Fifth Circuit Local Rule 47.5 which provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."

The decision of Judge William H. Barbour, Jr., of the United States District Court for the Southern District of Mississippi, Western Division, was entered by Memorandum Opinion and Order filed September 27, 1990. This decision is also unpublished.

The District Court's decision here sought to be reviewed was based upon an earlier decision on the merits rendered by a Three-Judge District Court, denying all relief to Petitioners. That decision was entered by Bench Opinion of March 24, 1989. It is unpublished.

The Supreme Court of the United States, on October 16, 1989, vacated the judgment of the Three-Judge District Court and remanded with instructions to dismiss the appeal as moot, in accordance with *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). That decision, *Monroe v. City of Woodville, Miss.*, is reported at ___ U.S. ___, 110 S.Ct. 273, 107 L.Ed.2d 254 (1989).

JURISDICTION

Jurisdiction of this Court is sought to be invoked pursuant to 28 U.S.C. Sections 1254 and 2101(c). The Petition for Writ of Certiorari was timely filed within ninety (90) days after the entry of judgment by the Fifth Circuit Court of Appeals on May 15, 1991, pursuant to Rule 13 of the Supreme Court Rules. This Brief in Opposition is timely filed within thirty (30) days after receipt of the Petition for Writ of Certiorari, pursuant to Rule 15 of the Supreme Court Rules.

STATUTES INVOLVED

42 U.S.C. Section 1973*l*(e) provides that "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth Amendment, [USCS Constitution, Amendments 14, 15] the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

The City of Woodville should not be held liable for attorneys' fees on a case that Petitioners lost. There are no issues presented on this Petition for Certiorari that warrant the review of this Court.

When this litigation began the Petitioners sought injunctive relief (1) to enjoin the appointment of election commissioners and (2) to enjoin the appointment of and obtain the election of a town marshal for the City of

Woodville, Mississippi. These claims were brought pursuant to Section 5 of the Voting Rights Act (R.Vol.1, p.4) against a town of 1,512 persons (R.Vol.1, p.179).[1] Petitioners prevailed on neither issue. Nevertheless, Petitioners now seek an award of $132,435.20 in attorneys' fees.

The Complaint was filed on March 2, 1988. More than a year prior to that date, the Mississippi Election Code had been amended to provide that towns of fewer than 20,000 people thereafter would appoint, rather than elect, the election commissioners. Section 23-15-221, Miss. Code Ann. 1972 (Supp. 1987). This change in State law was precleared by the United States Justice Department effective January 1, 1987. (See editor's note preceding Section 23-15-1 of the Mississippi Code, concerning the United States Attorney General's interposition of no objection to the amendment of former Section 23-11-13).

The Petitioners certainly did not prevail upon their frivolous claim that Woodville's Election Commissioners should continue to be elected after the precleared amendment to state law. At the Summary Judgment/Injunction hearing held on the merits, the Petitioners contested the preclearance of the Mississippi Election Code mandating the appointment of election commissioners, even in light of the Respondents' filing of record the letters of December 31, 1986, and January 2, 1987, from Gerald W. Jones,

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[1] The population of 1,512 is based on the 1980 census. the 1990 census is expected to show a decrease in that population.

Chief, Voting Section of the United States Justice Department reflecting that relevant changes in the Mississippi voting statutes indeed had been precleared. (R.Vol.4, pp.19-20).

The Petitioners had also sought relief from the Three-Judge Court to:

> (1) Declare that the change in the Town marshal position from an election to an appointed office violated Section 5 of the Voting Rights Act;

The Three-Judge District Court specifically held that the town had never changed the office of town marshal from elective to appointive. Rather, that office died due to lack of interest. The Petitioners obtained no relief with respect to this goal of their litigation. (R.Vol.3, p.727).

The town marshal's position paid only $50.00 per month and had powers virtually co-extensive with those of the chief of police, (R.Vol.1, p.210) whose position has been continually occupied since 1968. Since the last town marshal died in office in 1977, there had been no candidate who had attempted to qualify or run for town marshal. (R.Vol.1, p.7). After 1977, the position of town marshal simply remained unoccupied; no one wanted the job. The State Legislature did pass a self-enacting state statute which would have provided for appointment of Woodville's town marshal, but this enabling legislation was never adopted by an ordinance of the Town of Woodville to accomplish that act. (R.Vol.4, p.3). Neither did Woodville appoint a town marshal. The position simply remained vacant.

Next, Petitioners sought relief to:

> (2) Preliminarily and permanently enjoin defendants from appointing rather than electing the town marshal and order defendants to conduct an immediate election for chief of police;

The Three-Judge District Court held there to be no change in appointing rather than electing the town marshal. The Respondents were not ordered to conduct an immediate election for chief of police. The Petitioners at no point obtained either a preliminary or a permanent injunction in this action.

Third, Petitioners sought relief to:

> (3) Preliminarily and permanently enjoin the current chief of police from holding office.

Since 1968, a chief of police has held and continues to hold office in Woodville. Holding office since 1968 was one of the bases for the ruling of the Three-Judge Court: "The burden remained on the Plaintiffs to show that there had been a change. The evidence also, of course, that the Police Chief, and that was part of the evidence, I think, that perhaps the Plaintiffs were suggesting, that the Police Chief has assumed the role of the Marshal. Well, we looked at that and found that the Police Chief existed at the same time that the Marshal's office was and it was not an office that had been created as a subterfuge for the office of Town Marshall that they intended to abolish." (R.Vol.5, p.4).

No change was brought about as a result of this lawsuit which changed the position of the parties. Since there was no change in voting, the Petitioners did not prevail on the merits. On the subsequent attorneys' fees

issue, the Courts below have also concluded that there was no change achieved by the Petitioners which would justify fees. (District Court Memorandum Opinion and Order, R.Vol.3, pp.721-22).

Petitioners now attempt to characterize their claim as a challenge to the failure to call special elections when and after no one qualified to run for town marshal. This issue was never raised in the case presented on the merits and this issue cannot be properly before this Court. The District Court discussed and rejected the effort of the Petitioners to "to switch horses in midstream," (R.Vol.3, p. 728) and rejected the claim for fees based on Woodville's abolishing the town marshal position. The Petitioners never sought to abolish that office; nor could they validly seek to abolish an office under their claim for relief pursuant to the Voting Rights Act. The mere fact that Woodville did comply with preclearance procedures when it abolished the town marshal post does not render the Town liable for fees.

The Petitioners presented a meritless claim and lost before the Three-Judge Court. During the pendency of their appeal to the United States Supreme Court, the Town marshal position ceased to exist by way of an action unilaterally undertaken by Respondents to abolish the moribund office. There was, and is, no legal causation between the Petitioners' efforts and the abolition of the town marshal position. The Petitioners herein had never sought to abolish the town marshal position; they had sought to fill that position by election, pursuant to Section 5 of the Voting Rights Act. 42 U.S.C. Section 1973c. The Petitioners have not obtained, by catalyst or otherwise, any of the relief they sought in their complaint.

After the position of town marshal was abolished by preclearance of the United States Justice Department, the Three-Judge Court's Opinion was vacated as moot in light of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The Petitioners herein neither sought nor benefited by the action of Respondents which abolished the town marshal position or the action of State Legislature which had required the appointment of election commissioners. Respondents have never acknowledged any catalyst effect and specifically deny it.[2]

Following remand from the United States Supreme Court, the Petitioners moved for attorneys' fees and the Petitioners moved to dissolve the Three-Judge Court. (R.Vol.2, pp.359-417, 421-428). The Three-Judge Court was dissolved on July 16, 1990, (R.Vol.3, p.717), by order citing *Bond v. White*, 508 F.2d 1397, 1400 (5th Cir. 1975), pursuant to the Motion of Petitioners.

By Memorandum Opinion and Order entered September 27, 1990, (R.Vol.3, p.719), Judge William H. Barbour, Jr., denied Petitioners' Motion for Attorneys' Fees, upon a finding that the Petitioners were not prevailing parties. The District Judge had held, correctly, that "Since Plaintiffs have not achieved any of the goals that prompted the filing of this lawsuit, this Court concludes

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[2] Respondents specifically identify footnote 3, page 4 of the Petition for Writ of Certiorari as a perceived misstatement of fact, pursuant to Rule 15.1 of the Supreme Court Rules.

that Plaintiffs have failed to establish the first requirement for the finding of 'prevailing party' status." (R.Vol.3, p.728).

The Fifth Circuit affirmed the District Court decision without written opinion, citing its local rule 47.5 that no publication of an opinion was necessary where the decision would have no precedential value but merely decided particular cases on the basis of well-settled principles of law.

The proceedings on fees in this case have exceeded the efforts put forth on the merits. By notice from the Supreme Court filed in the District Clerk's office on October 19, 1989, the judgment of the Three-Judge Court had been vacated and the case had been remanded to the District Court with instructions to dismiss the appeal as moot. (R.Vol.2., pp.353,358). On that date, all proceedings on the merits of the case were finished. Three hundred fifty-three (353) pages of the record had been created. (R.Vol. 1, pp.1-229; Vol.2, pp.230-353). Since that date, all subsequent proceedings have touched on the Petitioners' Motions for Attorneys' Fees. Three hundred eighty (380) pages of the record had thus been created regarding the attorneys' fees issue before the District Court. (R.Vol.2, p.354; R.Vol.3, p.733).

At the Summary Judgment/Injunction hearing on the merits, when questioned by United States District Judge Tom Lee about the remedy the Petitioners then sought regarding the town marshal position, an attorney for the Petitioners stated "well, one of the remedies would be attorney's fees, first of all . . . " (R.Vol.4, p.26). In this case, there were no depositions and there was no trial. The Petitioners, represented through the Legal Services

Corporation (R.Vol.1, p.5)[3], have filed a motion seeking $132,435.20 in attorney's fees (R.Vol.3, p.719) (A figure which would be substantially increased by the appeal and this subsequent Petition for Certiorari). By way of comparison, the fees and expenses charged the Respondent Town by their counsel in this action was $7,338.64. (R.Vol.3, pp.472,476). Such an award to Petitioners would be unwarranted. The denial of the fees award presents no significant issue for review.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. The Single District Court Judge Decided a Question of Attorney's Fees, Not a Question Concerning Section 5 of the Voting Rights Act of 1965.

It was the Petitioners themselves who moved for the dissolution of the Three-Judge Court. (R.Vol.2, pp.421,424). The dissolution of the Three-Judge Court is supported by well-established precedent: *Bond v. White*, 508 F.2d 1397, 1400 (5th Cir. 1975), and *Jordan v. Allain*, 619 F.Supp. 98, 99 n.2 (N.D.Miss. 1985). Since the Petitioners' attorneys' fees claim is based on a catalyst theory, the Court's finding of "no change" is a finding of no change in the conduct of the Defendants for attorneys' fees purposes rather than a finding of "no change" under Section 5 for purposes of establishing relief on the merits.

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[3] Hon. Carroll Rhodes is in private practice and Hon. Willie Rose is no longer with Legal Services. Hon. Deborah A. McDonald remains with Southwest Mississippi Legal Services.

The Petitioners attempt a semantic argument, saying that a single District Judge cannot find that there was no "change" that had occurred pursuant to Section 5, (which requires a Three-Judge Court) while finding that there was no "change" for attorneys' fees purposes. This argument is self-defeating for the Petitioners since the burden is on them to show that there was a change in Respondents' conduct in order to justify their award of fees. *Associated Builders & Contractors of Louisiana, Inc., et al. v. The Orleans Parish School Board, et al.*, 919 F.2d 374 (5th Cir. 1990). The District Judge had held, correctly, that "Since Plaintiffs have not achieved any of the goals that prompted the filing of this lawsuit, this Court concludes that Plaintiffs have failed to establish the first requirement for the finding of 'prevailing party' status." (R.Vol.3, p.728). This finding of fact is a valid finding on the attorneys' fees issue. Making this finding that Petitioners were not prevailing parties does not transmute the District Court's decision on fees into a Section 5 determination.

Neither can the Petitioners claim that the Supreme Court's vacating the decision of the Three-Judge Court because the issues have become moot was in any manner an implicit reversal of the decision of the Three-Judge panel nor somehow a disagreement with that panel's decision on the merits. Instead, the vacation of judgment by the Supreme Court represents the standard, required response when a case becomes moot during the pendency on an appeal. *United States v. Munsingwear*, 340 U.S. 36, 39 (1950).

There is no substantial question presented here, there is no division among the circuits in applying settled law,

and the position of the United States Supreme Court in vacating judgments upon mootness of the issues would not justify an award of attorneys' fees.

II. Petitioners Are Not Prevailing Parties When the Unilateral Action of the Town to Abolish its Town Marshal Position was not Relief Which Petitioners Either Sought or to Which They Were Legally Entitled.

The Petitioners claim that their lawsuit prompted the Defendant Town to seek preclearance of the abolished town marshal position. However, the town marshal position had not been formally abolished, by action of the Board of Aldermen, before the suit was filed. The Petitioners did not seek its abolition. The Petitioners further did not seek preclearance of the abolition of the town marshal position. Rather Petitioners sought a prohibitory injunction enjoining the enforcement of a voting change which they alleged to have occurred, that of the elected town marshal position having become an appointed position. The town marshal was not appointed either before or during the interim during which this lawsuit was filed. Rather the town marshal position was vacant and remained vacant because no candidate had come forward to qualify for that position. The Petitioners additionally failed to show that they represented any party who had sought or would have sought to qualify for the town marshal post on either an elected or appointed basis. (R.Vol.4, p.26).

The Petitioners next attempt to raise a new challenge to an alleged failure to call special elections when and after no one qualified to run for town marshal. It is

difficult to see how holding special elections would have cured the failure of candidates to come forward for the regularly scheduled elections. Nevertheless, the Petitioners cite in support of that notion a 1908 Mississippi Supreme Court case, *State ex rel. Doolittle v. Hays*, 91 Miss. 755, 45 So. 728 (Miss. 1908). Their reliance is misplaced. *Doolittle* properly held only that a public office had not become vacant under definitions then enacted under the Mississippi Election Law. The Election Law referred to in that 1908 decision is based on a statute that has been recodified and/or amended at least three (3) times since that date and is currently in a form precleared by the United States Justice Department in 1987, again rendering any reference to such a statute moot. Neither *Doolittle* nor current State law can require a candidate to run for office. Even if there were such a requirement, such a claim would now be moot. Nor can an alleged, although moot, State law claim grant an award of attorney's fees under either Section 1988 or Section 19731(e).

Section 5, under which Petitioners now base their claim for attorneys' fees, is intended to reach any state enactment which may alter the election law of a covered state in even a minor way. *Allen v. Board of Elections*, 393 U.S. 544, 566 (1969). The Supreme Court has defined "change" in this context under Section 5 as being any change "reflecting the policy choices of the elected representatives of the people." *Hathorn v. Lovorn*, 457 U.S. 255 at 265, 266, n.16 (1982). There have been no policy choices of the Town of Woodville where no candidate has come forward and run for the town marshal position. Thus there is no Section 5 implication. Petitioners have not

secured by their litigation any relief which they sought. They are not entitled to fees.

Here, further proceedings on fees would be disproportionate to the major litigation. This Court has issued its plain admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 435, 437 (1981). Further, the amount of fees sought by Petitioners, $132,435.20, is disproportionate to the amount incurred for Respondents' attorney. "Although evidence of a defendant attorney's fees are not dispositive of the reasonableness of plaintiffs' fee request, a comparison of the two is entitled to some weight." *Blanchard v. Bergeson*, 893 F.2d 87 (5th Cir. 1990).

III. The District Court Found That Petitioners Prevailed on No Issue, Whether Central or Otherwise, By Direct Relief or Catalyst or Otherwise, and Were Therefore Not Entitled to an Award of Fees.

A "prevailing party" means "a party [who] has prevailed on the merits of at least some of his claims." *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980). Since Petitioners did not prevail, they deserve no fees.

In *Hewitt v. Helms*, 482 U.S. 755 (1987) the United States Supreme Court denied attorney's fees to a plaintiff who had "neither sought nor benefited" by subsequent actions of the defendants. The Court stated, "This case presents the peculiar sounding question whether a party who litigates to judgment and loses on all his claims can nonetheless be a 'prevailing party' for purposes of an award of attorney's fees." *Id.*, at 757. A respect for ordinary language requires that a plaintiff receive at least

some relief on the merits of his claim before he can be said to prevail. A plaintiff may indeed be a prevailing party for purposes of an award of attorney's fees where there has not been a final adjudication on the merits of his claim, but the case must be terminated by virtue of a settlement or voluntary conduct which brings a defendant's action into compliance with the relief sought by the plaintiffs, *E.g., Smith v. Robinson*, 468 U.S. 992, 1006 (1984); *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Wooton v. Housing Authority of City of Dallas*, 723 F.2d 390, 392 (5th Cir. 1984). For Petitioners to prevail by such a catalyst effect, it is required that there be achieved the "settling of some dispute which affects the behavior of the defendant toward plaintiffs before the plaintiffs can be entitled to fees." *Hewitt v. Helms, supra*, at 757. The Petitioners have not sustained their burden of proving they were a "substantial factor or significant catalyst in motivating the Defendants to end their unconstitutional behavior." *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir. 1979).

In assessing the Petitioners' catalyst claim, the District Court applied the test set forth in *Hennigan v. Quachita Parish School Board*, 749 F.2d 1148 (5th Cir. 1985). This standard has been recently reaffirmed and applied in *Associated Builders & Contractors of Louisiana, Inc., et al. v. The Orleans Parish School Board, et al.*, 919 F.2d 374 (5th Cir. 1990). Under *Hennigan*, the first element that must be established by a plaintiff claiming prevailing party status is whether, as a practical matter, the plaintiff's goal was achieved. 749 F.2d at 1152. At the time *Hennigan* was decided, the Fifth Circuit applied a "central issue" test. The Petitioners have here attacked the District Court's decision for having quoted part of the *Hennigan* language

using the old "central issue" requisites. However, the Petitioners have failed to show how, as a practical matter, they prevailed on either a central issue or on any issue for which they sought relief by way of their lawsuit. *Hennigan* has been reaffirmed on its catalyst theory by *Associated Builders, supra,* which follows the Supreme Court decision of *Texas State Teachers Association v. Garland Independent School District,* 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 886 (1989). The District Court, rather than ruling that Petitioners did not prevail on the central issue of the litigation, ruled that the Petitioners did not prevail on any issue raised by their litigation.

The Petitioners here neither sought nor benefited by the action of the Defendants which abolished the town marshal position or the action of the State legislature which required the appointment of election commissioners.

CONCLUSION

The Petitioners obtained none of the relief they sought, nor were they legally entitled to any relief. As the District Court observed, they should not be awarded fees because of unilateral action taken by the Town to abolish the moribund town marshal position. There is no substantial issue presented, no misapplication of this Court's precedent, and no conflict among the Circuits in applying

this Court's standards. There is no reason to require or suggest review on certiorari of the decisions entered here below.

Respectfully submitted,

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